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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FREEDOM FROM RELIGION FOUNDATION,
INC., a Wisconsin nonprofit
corporation,

Plaintiff,

vs.

CHIP WEBER, Flathead National
Forest Supervisor; UNITED STATES
FOREST SERVICE, an Agency of the
United States Department of
Agriculture,

Defendants,

and

WILLIAM GLIDDEN, RAYMOND LEOPOLD,
EUGENE THOMAS, NORMAN DeFORREST,
and the KNIGHTS OF COLUMBUS,

Defendant-Intervenors.

No. CV 12-19-M-DLC

PRELIMINARY PRETRIAL
CONFERENCE

Russell Smith Courthouse
Missoula, Montana

Tuesday, June 5, 2012
10:28 a.m. to 11:33 a.m.

HEARD BEFORE THE HONORABLE DANA L. CHRISTENSEN
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription.

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A P P E A R A N C E S

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1 TUESDAY, JUNE 5, 2012

2 Whereupon, the following proceedings were had and
3 entered of record in open court, with counsel present:

4 THE CLERK: This is the time set for a pretrial
5 preliminary conversation in CV 12-19-M-DLC, Freedom From
6 Religion Foundation vs. Chip Weber, et al.

7 THE COURT: Good morning, everyone. Welcome. For
8 those of you that are not from Montana, welcome to district
9 court here in Montana.

10 I signed this morning the orders allowing admission pro
11 hac vice for Eric Baxter and Eric Rassbach.

12 Are you Mr. Baxter?

13 MR. BAXTER: I'm Mr. Baxter. Mr. Rassbach will not
14 be here today.

15 THE COURT: All right, great. I've signed those.
16 There are some acknowledgements that you need to do, but
17 once you return the acknowledgment, then you are admitted
18 for purposes of this case.

19 MR. BAXTER: Thank you.

20 THE COURT: Everybody else I think is on board.
21 Would counsel please introduce themselves.

22 MR. KING: Good morning, Your Honor. My name is
23 Martin King. I'm with the Missoula firm of Worden Thane,
24 PC. We represent the Plaintiff, Freedom From Religion
25 Foundation. My co-counsel from Madison, Wisconsin is Rich

1 Bolton of the Boardman firm of Madison.

2 THE COURT: All right, great, thank you.

3 MR. GLAZER: Good morning, Your Honor. David Glazer
4 with the Department of Justice representing the Federal
5 Defendants.

6 MR. CAMPBELL: Good morning, Your Honor. Allen
7 Campbell with General Counsel's Office, Department of
8 Agriculture.

9 MR. HARBALL: Charles Harball, representing the
10 Knights of Columbus in this matter; and as you indicated,
11 Eric Baxter and Eric Rassbach will be working with us.
12 We're also representing individuals named.

13 THE COURT: All right, okay. Again, welcome
14 everyone. Obviously this is the time set for the
15 preliminary pretrial conference. I will tell you that
16 normally we do these in--we roll up our shirt sleeves and we
17 do them back in a conference room back here in the back part
18 of the chambers area, although on occasion we do these in
19 open court.

20 There has been obviously some interest by the public and
21 the press in this particular case, so I thought just in case
22 somebody wanted to see what we were up to in this process,
23 we would go ahead and do this in open court and do it on the
24 record. Other than that, there's no particular reason why
25 we're all in here doing it in open court.

1 I don't expect you, when we do this, to stand up. You
2 are welcome to stay seated and we'll just--like I said, this
3 is essentially a work session.

4 The custom and practice in this court, as I'm sure
5 Mr. King and Mr. Harball know--incidentally, Mr. Harball,
6 aren't you still the acting city manager up in Kalispell?

7 MR. HARBALL: I am. This is just a frolic for me.

8 THE COURT: I was going to say, you should have
9 plenty to do without needing to get yourself involved in
10 this. Anyway, it's good to see you.

11 Normally what we do is go through the Complaint. And as
12 I was indicating, the custom and practice here is to hammer
13 out some of the issues involved in the case and then at the
14 end of the process we'll issue a Scheduling Order. Our
15 scheduling orders are pretty detailed and provide a lot of
16 information in terms of the rules of engagement as we go
17 forward.

18 I inherited a process that has been established by Judge
19 Molloy. It's an excellent process and I haven't tweaked
20 with it very much because if it ain't broke, why fix it.

21 Let me introduce to you the folks that are here with the
22 court. You've met Beth Warren this morning. She's one of
23 our senior people in the clerk's office. She is normally
24 not my assigned clerk. My assigned clerk is Amanda Goodwin.
25 If you need to talk to that person, feel free to do so.

1 She's--she's out this week.

2 Julie Martin-Lake is our court reporter. And Julie's
3 been a court reporter here in Missoula for years, and a very
4 good one.

5 Tyler Gilman is my law clerk on loan from Judge Molloy
6 until I get settled in and get two law clerks of my own.
7 And with him this morning is Emily Cross, who is an
8 undergraduate at the University of Montana and she's
9 interning with us for the last month or so on sort of a
10 brief internship.

11 I've read, obviously, everything that you all have
12 filed. Let me just summarize what I understand to be the
13 basic positions of the parties. Again, this is a relatively
14 informal process, so feel free to, you know, interrupt or
15 interject at any point in time. And I want to have sort of
16 an open exchange here, particularly when we get to talking
17 about setting the schedule and things of that sort here in
18 the case.

19 The Complaint obviously seeks a declaratory judgment
20 under 28 United States Code Section 2201. As I understand,
21 the essential claim is that the continued authorization by
22 the Government, by the U.S. Forest Service, of the statue of
23 Jesus Christ at Big Mountain on U.S. Forest Service land
24 violates the establishment clause of the First Amendment of
25 the Constitution.

1 The Plaintiff, Freedom From Religion Foundation, Inc., a
2 nonprofit corporation under the laws of the State of
3 Wisconsin. And I understand you have over 100 members in
4 Montana; is that correct?

5 MR. BOLTON: That's correct.

6 THE COURT: I know that standing is probably going
7 to be a contested issue in this case, but I did read
8 Paragraph 9 of the Complaint which seems to be the
9 essential--although it's repeated later, that seems to be
10 the essential standing paragraph.

11 Are there members of your organization that actually
12 recreate up at Big Mountain, either in the summer or in the
13 winter, either skiing or hiking or biking up there?

14 MR. BOLTON: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. BOLTON: And, in fact, we--if we haven't
17 already, we will be identifying specific members to the
18 Defendants as well. Hopefully, you know, on that issue I
19 know, as you indicated, standing is always an issue in these
20 cases. And it may be that--I mean, we're going to be
21 providing information that hopefully we can at least get
22 that issue focused and perhaps even resolved, but there are
23 individual members.

24 THE COURT: All right. Yeah, I didn't see any--
25 obviously there are no individuals named as plaintiffs and I

1 didn't see any specific allegations in the Complaint that
2 would address the issue of standing. But I assumed, based
3 on the defenses being asserted, that this was probably going
4 to be an issue.

5 MR. BOLTON: And I apologize. Quite frankly, I
6 usually do identify specific members and for some reason we
7 didn't in this particular Complaint. So when that was drawn
8 to my attention, I went back, actually in the last day or
9 so, and have compiled the list of specific members who have
10 had access and exposure that we'll be relying on.

11 THE COURT: Just in terms of facts that seem to
12 be--well, I think they are undisputed in this case as I read
13 through the various answers. In October 1993 the original
14 permit was issued by the Forest Service to the Knights of
15 Columbus--well, that wasn't in '93. That was '53, wasn't
16 it? We'll get that correct. 1953, yes.

17 On August 24 of 2011, the Forest Service determined not
18 to renew the permit and it ordered the statue removed by
19 October 31, 2012.

20 And then on October 21, 2011, the Forest Service
21 withdrew that August 24th decision, to formally assess
22 public sentiment. And then the Montana State Historic
23 Preservation Office got involved about that time. And I
24 realize this is an issue of some contention between the
25 parties but, nevertheless, it's alleged in the Complaint

1 that the Montana State Historic Preservation Office
2 concurred with the Forest Service that the statue was not a
3 religious site and thus eligible for listing on the National
4 Register for Historic Places.

5 And then on January 31st of this year, the Forest
6 Service issued a new decision and reauthorized the special
7 use permit. That seems to be the essential facts in terms
8 of permitting. And I understand that the Plaintiffs allege
9 that this statue is an inherently religious message and that
10 its continued presence on public land violates the
11 Establishment Clause by giving the appearance of Government
12 endorsement of Christianity in general, and Roman
13 Catholicism in particular, and diminishes the civil and
14 political standing of nonreligious and nonChristian
15 Americans and constitutes governmental preference for
16 religion and Christianity.

17 Did I fairly summarize your Complaint?

18 MR. BOLTON: Yes, Your Honor.

19 THE COURT: Looking at the Answers of the Federal
20 Defendant, you assert one affirmative defense and that goes
21 to the issue of standing, which I saw in your answer, that
22 they lack either Article III or prudential standing or both.

23 And in terms of the Intervenor, you have alleged in
24 affirmative defenses that the Court lacks subject matter
25 jurisdiction. I understand that argument relates largely to

1 the Plaintiff's lack of standing. And that the plaintiffs
2 lack Article III standing, as well as lacking prudential
3 standing.

4 Does that fairly summarize the defenses? Of course,
5 I've gone through and seen the various--read the Complaint
6 and the Answers and sort of compared the Complaint
7 allegations to the specific admissions or denials by the
8 Defendant and the Intervenor and have a pretty good sense,
9 I think, as to where we are procedurally at least in terms
10 of the posture of the initial pleadings.

11 Is there any question that the Court's got jurisdiction?
12 I mean, other than the Article III standing issue, any
13 dispute as to the Court's jurisdiction?

14 Plaintiffs? Obviously you filed it in federal court.

15 MR. BOLTON: We think jurisdiction is fine, Your
16 Honor.

17 THE COURT: Any question from the Defendant or the
18 Intervenor?

19 MR. GLAZER: If the Plaintiffs do indeed have
20 standing, I think this is a proper federal question for this
21 court.

22 THE COURT: That would be my opinion as well.
23 Intervenor agree?

24 MR. BAXTER: We will concur with that, yes.

25 THE COURT: One of the things we take pretty

1 seriously, and like to try to do at this stage of the
2 proceeding, is to see if we can't reach some agreement as to
3 certain essential facts that are present in the case, so
4 that the parties don't need to scurry around and conduct
5 discovery on certain things.

6 I noted from the Amended Rule 26(f) Joint Discovery Plan
7 that was filed, that--and I don't know if it was in that or
8 if it was in one of the parties' preliminary pretrial
9 submissions, but the indication that was made that once
10 Administrative Record gets filed in the case, that the
11 parties may then have a basis to stipulate to a number of
12 facts. I think maybe it was in the Plaintiff's preliminary
13 pretrial statement where I saw that.

14 One of the things that I would like to do is see if we
15 can't agree or stipulate to certain facts today. I'm not
16 sure that we're going to be able to, but I've got a plan
17 here in mind in terms of what we might do over the course of
18 the next week or so to sort of get some facts in this
19 Scheduling Order that are agreed to between the parties.

20 But if we could, let's just start by looking at the
21 proposed stipulations of fact and law that the parties have
22 proposed. I'm not sure there's much here that the parties
23 are going to agree to, but what I want to do is I want to go
24 through the ones that have been proposed. There aren't
25 many. Get the position of the parties on the ones that are

1 proposed and then we'll talk about what I'm going to ask you
2 all to do in the next week.

3 But let's start, if we could, with the Plaintiff's
4 Amended Preliminary Pretrial Statement. I'm looking at
5 Page 3 of Paragraph H. And I can sort of anticipate what
6 the Defendants' positions are on these, but I just need a
7 yea or nay in terms of your position on this and then we'll
8 strike them or include them in the Scheduling Order.

9 And I'm sure Mr. King and Mr. Harball know what we're
10 trying to accomplish here because I know particularly
11 Mr. King's been over here and been through this drill
12 before.

13 But let's start with the Plaintiff's proposed
14 Stipulation of Fact No. 1. And if either of the Federal
15 Defendants or the Intervenor object, just say so.

16 Number one, the continued presence of the statue of
17 Jesus Christ on United States Forest Service property gives
18 the appearance of governmental endorsement of religion.

19 MR. GLAZER: Speaking for the Federal Defendants,
20 Your Honor, I think we would have to object to that.

21 THE COURT: Yeah, I understand and I anticipated
22 that. We won't include that.

23 The statue of Jesus Christ is readily identifiable as a
24 patently religious figure. Do you agree or disagree with
25 that?

1 MR. GLAZER: I would disagree in this context. I am
2 sure there are some contexts in which the statue of Jesus
3 Christ would be readily identifiable as a religious figure.
4 But I think in this context, in this location, I don't think
5 that's necessarily the case.

6 THE COURT: So you object to that.

7 You'll notice, Mr. Harball, I haven't even gotten to you
8 yet. I don't need to because we've got objections.

9 So those are the two proposed stipulations of fact and
10 law from the Plaintiffs.

11 Let's go to the Federal Defendants' Preliminary Pretrial
12 Statement. And here--okay.

13 Mr. Bolton, the court reporter is having trouble
14 apparently hearing you. If you could move that--do we have
15 all the mikes on in the courtroom? If you could move that
16 mike maybe a little closer.

17 COURT REPORTER: The monitor, if he can move the
18 monitor over.

19 THE COURT: Oh, move the monitor.

20 COURT REPORTER: I can't see your face.

21 MR. BOLTON: That's just great. I don't hear that
22 well either, and in Wisconsin the district court that I'm in
23 has this monitor right in front and I can't see anybody and
24 it helps to see the speaker a lot of times.

25 THE COURT: It does, yeah.

1 MR. BOLTON: Can you hear me better now? Okay.

2 THE COURT: All right. Obviously we don't have any
3 proposed factual stipulations here from the Federal
4 Defendants other than the representation. And this is what
5 I had read and I misrepresented that it was the Plaintiffs I
6 thought that had proposed this. But that the parties, once
7 the Administrative Record is filed or submitted--which I
8 understand occurred yesterday, at least we got our copy.
9 Did the Plaintiff get their copy of the Administrative
10 Record?

11 MR. BOLTON: I did, and I'll be honest, I haven't
12 gone through it.

13 THE COURT: I understand. That was just yesterday.

14 MR. BOLTON: But I do have it.

15 THE COURT: Okay. That there may be some facts that
16 could be stipulated to.

17 All right, then let's go to the Preliminary Pretrial
18 Statement filed by the Intervenor, and we've got six
19 proposed stipulations of fact. Let's see if the Plaintiff
20 and Defendant, the Federal Defendants, can agree to these.

21 One--and I'm looking at Page 4. Does everybody have
22 them in front of them? All right.

23 The memorial is privately owned and maintained by
24 residents of the Kalispell area.

25 Any objection to that?

1 MR. BOLTON: No.

2 THE COURT: Two. The memorial comprises private,
3 not government speech.

4 MR. BOLTON: I do disagree with that.

5 THE COURT: Three. The memorial stands on Big
6 Mountain within the Whitefish Mountain resort ski area. Any
7 objection?

8 MR. KING: Judge, I'm not sure whether or not that
9 little plot of land is within the resort ski area or not.

10 THE COURT: So you are going to hold fire on that
11 one?

12 MR. KING: Yeah, I think we'll hold fire.

13 THE COURT: Four. The Whitefish Mountain Resort is
14 privately owned and operated. Any disagreement with that?

15 MR. KING: Other than whatever special-use permit,
16 no, I think we agree with that.

17 MR. GLAZER: If I may. I'm not sure what they are
18 including within the geographic bounds. I mean, obviously
19 there are parts of it on Forest Service land.

20 THE COURT: Right. They are referring here to the
21 resort, I assume.

22 MR. HARBALL: As a business entity.

23 THE COURT: As a business entity. Any objection to
24 four?

25 MR. BOLTON: With that qualification, I don't think

1 so, no.

2 THE COURT: Is the business entity still Winter
3 Sports, Inc.? Do you know, Mr. Harball?

4 MR. HARBALL: Yes, sir, it is.

5 THE COURT: Why don't we modify No. 4 to read
6 something to this effect: The Whitefish Mountain Resort,
7 which is owned by Winter Sports, Inc., is a private--let's
8 see if we can come up with something here.

9 MR. BAXTER: How about "is owned by Winter Sports,
10 Inc. which is privately owned"?

11 THE COURT: Is that acceptable to the Plaintiffs and
12 to the Federal Defendants?

13 MR. GLAZER: I mean, would it help to say Winter
14 Sports, Inc., which is a privately owned entity, operates
15 the Whitefish Mountain Resort?

16 THE COURT: The Whitefish Mountain Resort. That
17 sounds good. Let's do that.

18 MR. KING: Plaintiff is okay with that, Judge.

19 THE COURT: I think as time goes on some of these
20 things will be readily admitted, but we're trying to do as
21 much of this as we can on the front end so you all, like I
22 said, don't need to scurry around spending time and money
23 proving things that are established.

24 Number five. The upper end of the Whitefish Mountain
25 resort ski area, including where the memorial stands, is on

1 public land.

2 Acceptable to the Plaintiff?

3 MR. BOLTON: That's acceptable.

4 MR. KING: Yeah, Judge, we agree the memorial is on
5 public land. I'm not sure what the "upper end" means.

6 THE COURT: Right.

7 MR. KING: But other than that, we agree that it
8 stands on public land.

9 MR. GLAZER: If I could offer an edit.

10 THE COURT: Yes.

11 MR. GLAZER: Perhaps the upper end of the Whitefish
12 Mountain ski resort area where the memorial stands is on
13 public land. That part I don't think anybody disputes.

14 THE COURT: How about that, Plaintiffs?

15 MR. KING: Yes, we're fine with that, Judge.

16 THE COURT: Okay. Are you okay with that,
17 Mr. Harball?

18 MR. HARBALL: Yes, sir.

19 THE COURT: Good, thank you.

20 All right, number six. The Whitefish Mountain Resort
21 operates the portions of its ski slopes that are on public
22 land pursuant to a permit from the U.S. Forest Service.

23 Let me start with the Federal Defendant. Any objection
24 to that?

25 MR. BOLTON: I don't know, Your Honor.

1 THE COURT: You don't know the answer to that?

2 MR. BOLTON: No, I don't.

3 THE COURT: We'll just skip that one if you don't
4 know that as a fact.

5 Okay, here's what I would like the parties to do on this
6 subject. We're going to hold off filing the preliminary--
7 the order, the Scheduling Order, following this conference
8 until next Wednesday. What I want the parties to do by next
9 Tuesday, by 5 o'clock--even though we can file documents
10 here electronically after that, we'll establish 5 o'clock
11 Mountain Time.

12 I want the parties to file a stipulation of facts that
13 includes those matters which have been alleged in the
14 Plaintiff's Complaint and admitted by both of the parties in
15 their Answers. And I think it's a fair amount of--I think
16 it's a significant number of allegations.

17 And, Mr. King, I'm going to ask you to take the lead on
18 this because it's obviously in your client's best interest
19 to have this done, is to go through--I mean, I would have
20 done it but I think it's more counsel's job to do this.

21 Take your Complaint, obviously go through, look at your
22 two Answers, and then propose to the Federal Defendants and
23 the Intervenor those matters which they have admitted, and
24 then file that with the Court by Tuesday at 5:00 and then
25 we'll incorporate that, along with these additional facts,

1 into the stipulation of facts portion of the Scheduling
2 Order.

3 MR. KING: Yes, Your Honor.

4 THE COURT: All right, thank you.

5 MR. GLAZER: Your Honor, if I may?

6 THE COURT: Yes.

7 MR. GLAZER: I have to travel Tuesday for a
8 preliminary injunction hearing on Wednesday in Idaho, so
9 this might make it a little difficult for me. If I could
10 get a day or two extra following Wednesday the 13th.

11 THE COURT: Well, it's Tuesday now. What are you
12 doing the rest of this week?

13 MR. GLAZER: The rest of today I'm traveling.

14 THE COURT: Okay. This is pretty straightforward.
15 I don't think this is going to be complicated and I think
16 you and--is it Mr. Campbell?

17 MR. CAMPBELL: Yes, sir.

18 THE COURT: And where are you located?

19 MR. CAMPBELL: I'm across the street.

20 THE COURT: That's what I thought. You looked
21 familiar to me. You are the local color on this.

22 MR. CAMPBELL: General Counsel's Office.

23 THE COURT: Right. I don't think this is going to
24 be all that complicated, Mr. Glazer. I think when Mr. King
25 and Mr. Bolton put this together and you look at your

1 Answer, you are going to see you've already admitted these
2 things.

3 MR. BOLTON: We'll try to get it to them--

4 THE COURT: Let's see if we can hold to the schedule
5 that I've proposed and get this done so we can get the
6 Scheduling Order out.

7 Okay. The Joint Discovery Plan that has been amended
8 and filed. One of the things that was indicated in that
9 plan is that the federal government would file the
10 Administrative Record, I understand, or submit the
11 Administrative Record by the 5th. I understand that has
12 been done.

13 And then there seems to be some disagreement between the
14 parties, at least between the initial parties, the Plaintiff
15 and the Federal Defendants, regarding the issue of whether
16 the Court's review is limited to the Administrative Record
17 under the Administrative Procedure Act which, of course,
18 would govern discovery in this case.

19 Now, I read the federal government's filings pretty
20 carefully and it looks to me like you've asserted that
21 position, but you also seem to be conceding that we may be
22 going outside of the Administrative Record here, or at least
23 discovery may take place outside of the Administrative
24 Record. What exactly is your position on this?

25 MR. GLAZER: I think our position evolved somewhat

1 since we first thought about the case. I think some of the
2 controlling factors under what we think is the governing
3 Supreme Court precedent aren't readily apparent from the
4 record itself. And it may require, for instance, retaining
5 a historian, for instance, to provide an understanding of
6 the historical setting and perception of the statue.

7 Since that's not in the record, that would need to be
8 supplemented--the record would need to be supplemented with
9 that information and it may be that Plaintiffs have a
10 competing view, which the Court would then have to resolve.

11 THE COURT: Right.

12 MR. GLAZER: I think what we mainly focused on was
13 the forest--when we did the Joint Discovery Plan, is that
14 the forest supervisor's decision itself is--comes within the
15 purview of the Administrative Procedure Act. In other
16 words, it stands or falls objectively on the record; and
17 getting into the decision maker's thought processes really
18 isn't appropriate or even terribly useful in a case that's
19 basically a legal question such as this.

20 THE COURT: What--from the Plaintiff's point of
21 view, what sort of discovery do you anticipate? And, again,
22 this is--we're just having a free discussion here. I
23 don't--you are not bound by what you say in terms of what
24 your discovery might or might not be, but what are you
25 contemplating here in terms of discovery?

1 MR. BOLTON: Beyond the Administrative Record, the
2 types of things that we would be looking for would be, for
3 instance, communications relating to, for instance, the
4 reaction that was received to the initial decision
5 disallowing it. Communications within the agency and
6 communications by--to and from third parties, which I think
7 may bear upon, you know, whether this is perceived as a war
8 memorial or, as it's characterized, as a religious shrine.

9 In terms of just, real briefly, the APA issue, a couple
10 of things. Number one, we don't view this as strictly an
11 APA, Administrative Procedure Act, review. Obviously we
12 weren't even parties to the--to any administrative
13 proceeding.

14 The APA is important, in that Section 5 has been
15 construed by the courts to be a waiver of the federal
16 government's sovereign immunity. But the courts have also
17 uniformly held that that waiver of sovereign immunity by--in
18 Section 5, I believe, of the APA, does not mean that with
19 constitutional issues only APA reviews are permitted.

20 And so obviously I don't see this limited to the
21 Administrative Record and to the standard of review of an
22 administrative review.

23 But realistically, you know, the types of things that
24 we're looking for are, as Mr. Glazer, indicated, some
25 historical things in terms of the history of the shrine; and

1 then more contemporaneously, communications, including
2 communications relating to the initial reaction to the
3 Defendant's initial decision to not renew the permit, both
4 within communications that were received and led up to the
5 decision, then to pull back that decision and go in a
6 different direction, as well as communications within the
7 agency.

8 Now, I understand there may be--I don't think this
9 fairly holds true with, for instance, communications that
10 are received from the public, and not just the public
11 comment part of the record.

12 There may be internal records that would be--that would
13 not be subject to discovery under the deliberative process
14 of the agency, and I recognize that. And to the extent that
15 there are documents that would be subject to that, you know,
16 I'm not--that's not a fight that I'm wanting to have. But I
17 think there are discoverable records--discoverable documents
18 beyond the Administrative Record itself.

19 But I don't foresee, and I don't want to get into, you
20 know, a lot of contention over that. So it's not--it's not
21 like I'm going to be looking for, you know, communications
22 between Mr. Weber and any counsel, for instance, or any
23 legal advice that may have been received relating to the
24 process that he went through.

25 Again, we don't know just yet whether there are any such

1 documents; but to the extent that there are, I'm certainly
2 willing to discuss and work with Mr. Glazer to, you know,
3 try and make it as unintrusive as possible, but at the same
4 time get to the record pertinent to the criteria that we
5 need to address.

6 THE COURT: Okay. Mr. Harball, Mr. Baxter, what's
7 your thinking in terms of discovery that the Knights of
8 Columbus may want to conduct in the case?

9 MR. BAXTER: I think foremost there may be some
10 discovery on standing, depending on what the Plaintiffs
11 present as far as their individual members.

12 I'm not sure on the merits we would have that much other
13 discovery. There may be some on historical issues. But I
14 think most of those, what's relevant is what the agency had
15 when making the decision. Those should be in the
16 Administrative Record.

17 And also the communications that the Plaintiff's counsel
18 have mentioned, presumably those should also be in the
19 record if they are relied upon by the agency and used to
20 make a decision. But I don't anticipate there would be any
21 significant amount of discovery outside of that. So we
22 would reserve the right to object to any external.

23 THE COURT: Right. We're dealing here with--I mean,
24 we're obviously very early in the case and I understand that
25 discovery is--I assume you haven't commenced any discovery

1 yet, have you? Yeah.

2 Let me just say this, that when you get into discovery
3 if it looks like somebody's getting heartburn over where
4 discovery's going, just let me know. I've got a good
5 feeling about the lawyers in this case. You obviously have
6 all--you all are experienced and you seem to be getting
7 along just fine so far. But what we don't want to do is get
8 into prolonged motions to compel, things of that sort.

9 So, for instance, you know, Mr. Glazer, if the
10 Plaintiffs want to take Chip Weber's deposition and you
11 anticipate there's going to be some issues that require the
12 Court's interference, just tee it up and let me know. Let's
13 do it that way rather than getting into depositions and
14 having snits and phone calls and that sort of stuff, because
15 we can help you out with that if we need to. It doesn't
16 sound to me like you are going to need much help; but if it
17 comes up, just let us know and we'll help you get those
18 things sorted out.

19 It seems to me--and I want to ask all of you just to
20 sort of share with me what you think the judicial standard
21 is here and the standard that we're dealing with.

22 But it strikes me that this case--whatever standard
23 we're dealing with--that discovery concerning the history of
24 this statue from 1953 on, not only from the standpoint of,
25 you know, the history of the U.S. Forest Service involvement

1 but just the history of this statue and how it's been
2 perceived, is probably relevant and going to be of some
3 value to me in terms of resolving this case. Now, that's
4 just my preliminary thinking on this.

5 What I'm saying is I don't think, based upon what I've
6 seen so far, that this is a case where my review is going to
7 be limited to the Administrative Record. But I'm open to
8 being convinced otherwise if that's where this goes.

9 But I am curious, having done already some sort of
10 preliminary reading on this and I see all of these various
11 tests that have been articulated over the years. The Lemon
12 test, which appears to be largely put aside or maybe in some
13 disfavor currently.

14 I see what's called a--sort of a more strict endorsement
15 test. I've come across reference to a more liberal
16 standard, the coercion test.

17 And then it was proposed to me by the Federal Defendants
18 in this case that we've got what's--what would be referred
19 to as the flexible test under the *Van Orden vs. Perry*
20 decision, the U.S. Supreme Court decision from 2005, which I
21 have read, which doesn't pay a lot of heed to the Lemon
22 test.

23 Again, not tying anybody to any particular position as
24 we go forward, I'm just curious in terms of what the
25 thinking is in terms of the tests here.

1 Mr. Bolton, can you give me--I mean, what do you think
2 we're going to be looking at in terms of the test?

3 MR. BOLTON: You know--

4 THE COURT: I assume you litigate these cases all
5 the time.

6 MR. BOLTON: I see these issues all the time, you
7 are right.

8 THE COURT: Right, right.

9 MR. BOLTON: You know, most of these display cases,
10 whether they are display or government speech, really end up
11 not turning on the nuances of the different tests. They
12 usually focus on a single element, which is really an
13 element of almost all of the different formulations, and
14 that is what's been called the endorsement issue in terms of
15 secular purpose, entanglement under *Lemon* and some of the
16 other. I don't think we've really got a--in other cases
17 we've got the *Marsh* issue with legislative invocation.

18 I think this case, as does most of the--most of the
19 display and speech cases, really turns on--will turn on the
20 issue of endorsement. And I think under really all of the
21 different formulations, that's going to be the key issue.

22 THE COURT: Okay. Mr. Glazer.

23 MR. GLAZER: Well, certainly the Court in *McCrary*,
24 which dealt with a Decalogue display, didn't get beyond the
25 purpose of *Lemon vs. Kurtzman*, because it found that that

1 element alone raised problems. The context of that case was
2 very controversial, unlike this case. And unlike the
3 display that was subject to an opinion that I believe was
4 handed down the same day as *McCrory*, and that was *Van Orden*,
5 in which the court said, well, the purpose is only one of a
6 suite of factors we look at in deciding whether a purely
7 factual display, at least one that's generated no
8 controversies up to the point of actual litigation, whether
9 that passes constitutional muster. And in this case, you
10 know, no one has raised an issue about the statue in
11 60 years until very recently.

12 And I think if one looks at that whole context and
13 perception of this monument, one will find that it doesn't
14 convey any government endorsement of religion. So that's
15 how we perceive this case.

16 THE COURT: Okay, all right.

17 Mr. Baxter, Mr. Harball.

18 MR. HARBALL: Well, the reason Mr. Baxter is here is
19 because this is all he does.

20 THE COURT: Yeah. Well, I assume so. And what
21 is--what's the name of the firm or the organization--

22 MR. BAXTER: The Becket Fund For Religious Liberty.

23 THE COURT: And what's that organization?

24 MR. BAXTER: Nonprofit law firm, and we focus
25 exclusively on First Amendment religious liberty questions.

1 THE COURT: Have you and Mr. Bolton crossed paths
2 before?

3 MR. BAXTER: I have not crossed paths with him
4 before, but our organization has crossed paths with Freedom
5 From Religion Foundation.

6 MR. BOLTON: I'm sure it was an enjoyable
7 experience.

8 THE COURT: I'm sure it was. That's great.
9 What's your view of the standard?

10 MR. BAXTER: Of course, we would appreciate you
11 adopting the coercion standard, but I understand under the
12 existing case law that--

13 We basically will concur with what the Federal
14 Defendants have said, that you'll look at this. I don't
15 think there is any issue of purpose in this case.

16 But we would agree that based on the facts and
17 circumstances of this case, the--it's a neutrally
18 administered permitting system, private speech in an area
19 where there is a lot of other private speech going on, that
20 there is no indicia of any kind of government endorsement.

21 THE COURT: Okay, all right. Well, that's helpful
22 to the Court and I appreciate that. And I understand as we
23 go forward you all may want to propose a different standard
24 or test, but that gives me some idea as to where you are
25 coming from, at least at this early stage of the proceeding.

1 Let's talk about just some miscellaneous things here.
2 As I looked at the--before we actually get into scheduling.

3 As I looked at the Joint Discovery Plan, we've talked
4 about discovery. One of the things that--one of the
5 sections within the Preliminary Pretrial Statement has to do
6 with resolution, whether it be through compromise and/or
7 settlement. And I am not--I mean, before I took this job on
8 I sat out there where you are sitting, for 35 years, and the
9 last thing that I felt that I needed was some judge putting
10 the boot to me and telling me I needed to settle a case.

11 I view my responsibility as being a trial judge and this
12 is a trial court and if you all want a trial, you are going
13 to have a trial as soon as I can possibly give you one. And
14 I believe that passionately.

15 So all I will say is this: If you want the Court's help
16 with settlement, just let me know and we'll make available
17 to you a U.S. Magistrate. If you want to use a private
18 mediator, that's perfectly acceptable to me. But if you
19 want the resources of the federal judiciary to be made
20 available to you, we'll do that. Just give us--just make a
21 request and give us a little bit of notice and we'll help
22 you out on that score.

23 We've talked about what I want you to do by next Tuesday
24 at 5:00. We've talked a little bit about what the standard
25 or test is here.

1 Let's go through and talk about scheduling now. I've
2 got--let me tell you what I was thinking. Before I received
3 your materials I was looking at maybe giving you all a
4 trial--I mean, you have to tell me what you want to do,
5 because I'm going to do what you tell me to do in terms of a
6 trial setting. Some people want a trial setting as soon as
7 they can get one and some people approach these things in a
8 little more relaxed mode. I know you are all extremely
9 busy, but I was prepared to give you a trial setting, and
10 work backwards from that setting, in November of this year.

11 MR. BOLTON: That's fine.

12 THE COURT: Get it done, now.

13 You proposed to me in your Joint Discovery Plan a close
14 of discovery after the date I was going to give you for a
15 trial setting. You proposed an early December close of
16 discovery. And you all have a better idea than I do as to
17 how much discovery you need to do in this case. And I know
18 how we get to scheduling things and I'm already seeing
19 fatigue set in in Mr. Glazer's eyes. He's thinking between
20 now and November I don't have a minute free to do anything.
21 What is this judge in Montana trying to do to me.

22 So I'm perfectly prepared to give you a trial setting.
23 You know, obviously we're not going to do this between
24 Thanksgiving and New Year's. That's inhumane, but I did
25 have November 13th set aside as a trial setting.

1 I also have, as an alternative, put March 11th as a
2 trial setting, which is the earliest trial setting I could
3 give you following on your December 1 close of discovery
4 proposal. And we can come up with a later trial setting.
5 We could come up with an earlier one, but I'm sure that's
6 not going to be of any interest. So what's--so pick your
7 poison.

8 Now, here's the program, Mr. King can tell you this.
9 When we set a case for trial, this is going to be the number
10 one trial setting absent a criminal matter that would bump
11 us. And unless one of you ends up with a deathly illness or
12 something like that, we will try the case on that date. So
13 now is your time to negotiate your trial setting, because
14 I'm going to want to hold--we'll hold to that trial setting
15 again unless we've got a natural disaster or death amongst
16 counsel.

17 So what's the Plaintiff thinking?

18 MR. BOLTON: Your Honor, quite frankly from my
19 perspective, we can accommodate pretty much--we will
20 accommodate pretty much any schedule that we're given.

21 I think of the dates that you discussed, the March trial
22 date would be our choice. Now, having said that I'll also
23 say this: If the Defendants are crunched just because of
24 scheduling and everything, I mean, going with May or some
25 date like that is fine with us, but our first choice would

1 be the March trial date.

2 MR. KING: Judge--

3 THE COURT: Oh, I'm sorry, Mr. King.

4 MR. KING: On the March trial date, what do you
5 think that the deadlines would be for motions?

6 THE COURT: Okay, let's--let me--I'll get to that.
7 Let me just survey the remainder here just on the general
8 concept of yet this year or in the spring.

9 Mr. Glazer.

10 MR. GLAZER: Excuse me, I was--

11 THE COURT: General concept. Do you want to try to
12 get this case tried in November, this fall, or would you
13 rather wait until spring?

14 MR. GLAZER: I would much prefer waiting until
15 spring.

16 THE COURT: Mr. Harball?

17 MR. HARBALL: We concur. March would be fine.

18 THE COURT: Okay, all right. So let's be specific
19 then. How is the March 11th date? I realize you are
20 handicapped, you do not have your cell phones and things of
21 that sort with you, but can you look into the future and
22 think about March 11th?

23 MR. GLAZER: I guess speaking from the Federal
24 Defendants, my only reservation is the thought that we would
25 give motions for summary judgment a chance.

1 THE COURT: Well, and that's Mr. King's question.
2 Let me go to the Intervenor. Does March 11 work for you
3 two?

4 MR. HARBALL: Yes, sir.

5 MR. BAXTER: Yes.

6 THE COURT: Mr. Baxter, that's an affirmative?

7 MR. BAXTER: Yes.

8 THE COURT: Mr. King's question is, if we set this
9 case on March 11th, let's back up. I've got the discovery
10 deadline as December 1st. That's the one you proposed.

11 I've got a motions deadline, which is fully briefed, and
12 here's where we may have the rub, of January 11th. And
13 that's--I mean, I don't want to mess up people's holidays.
14 But fully briefed means fully briefed, so you've got to
15 count back from that.

16 So the opening briefs would be due, you know, some
17 period of time before that. Probably about the time you
18 have Thanksgiving or Christmas on the brain.

19 MR. GLAZER: It may be that we don't need that much
20 time for discovery given the posture of this case, and it
21 might make sense to move the motions deadline up to this
22 year.

23 THE COURT: What would you think about a
24 November 1st--I don't know what day of the week that is--
25 discovery deadline? That's a month earlier than what you

1 proposed.

2 MR. BOLTON: For the dispositive motion?

3 THE COURT: No, for the discovery deadline.

4 MR. BOLTON: Oh, that's fine.

5 THE COURT: Okay, does that work, November 1st? I
6 mean, goodness, this is one of those things where you all
7 can set aside three or four days, go up to the Flathead,
8 take the depositions and you are done. Probably, I mean. I
9 don't want to tell you what to do, but that's what I would
10 expect would probably happen.

11 Okay, let's work then from a November 1st discovery
12 deadline. Tyler, what would work then in terms of a motions
13 deadline fully briefed? Can we move that up to--

14 MR. GILMAN: December 3rd.

15 THE COURT: December 3rd?

16 MR. BOLTON: That's fine.

17 MR. BAXTER: If that's fully briefed, so that would
18 be the Defendants' motion, response and reply in 30 days?

19 THE COURT: It's a motion and it's your response
20 brief. Reply briefs are optional.

21 MR. GLAZER: So if I may, Your Honor.

22 THE COURT: Yes.

23 MR. GLAZER: So if the parties are cross moving,
24 they would file simultaneous briefs?

25 THE COURT: Yes. Here's what it says in the

1 Scheduling Order that I'm going to issue. "Pursuant to
2 Federal Rule of Civil Procedure 16(b)(3)(A), all dispositive
3 motions, discovery motions and motions in limine shall be
4 fully briefed by the date set forth in Paragraph 1. Fully
5 briefed means that the brief in support of the motion and
6 the opposing party's response brief are filed with the
7 court."

8 So, Mr. Baxter.

9 MR. BAXTER: I would propose 45 days, Your Honor,
10 from the close of discovery to file initial briefs and
11 responses.

12 THE COURT: So you are proposing the middle of
13 December. That's fine with me.

14 What date would that be, Tyler?

15 MR. GILMAN: 14th.

16 THE COURT: Is that a Monday or a Friday?

17 MR. GILMAN: That's Friday.

18 THE COURT: Friday, the 14th of December, you will
19 have all your briefing, you will have your discovery done,
20 you can enjoy the holidays and there we are.

21 Okay, so if we've got that done, a month ahead of
22 schedule, do you still want to go with the March 11th trial?
23 Hold that date? Okay. And then we'll work back from that.
24 Here's the other deadlines that we're going to set.

25 We're going to set a deadline for disclosure of experts.

1 We'll talk about that in a minute. We're going to set a
2 deadline for amending pleadings. We've talked about the
3 motions deadline of December 14th. And then we'll set a
4 deadline for the attorney conference to prepare the Final
5 Pretrial Order and then a deadline for you all to submit the
6 Final Pretrial Order and Proposed Findings of Fact and
7 Conclusions of Law and the various notices that need to be
8 given to the Court. And then my practice is to set the
9 Final Pretrial Conference at the same--on the morning of the
10 first day of trial.

11 Now, if that all makes you nervous and you would rather
12 have it a couple of weeks before trial, we can do that.
13 I've seen lawyers do both. I mean, generally everything's
14 been filed. We've got a Final Pretrial Order. We've had
15 all the motions filed. We pretty much have got everything
16 resolved. I feel like at 8:30 a.m. we can have a Final
17 Pretrial Conference and then go to trial right after we're
18 done. But if you all want to do it earlier, tell me.

19 So what's your preference there, Plaintiff? Would you
20 rather have the pretrial conference before or on the same
21 day as the trial?

22 MR. KING: We're fine doing it on the same day as
23 trial, Judge.

24 THE COURT: Okay, Mr. Glazer, Mr. Campbell?

25 MR. GLAZER: I don't think we have a preference

1 either way.

2 THE COURT: Mr. Harball, Mr. Baxter?

3 MR. HARBALL: We concur the same day as the trial.

4 THE COURT: Okay. I mean, you all don't need to be
5 traveling back and forth here more than you need to, so
6 let's go ahead.

7 We'll set the pretrial conference then on the morning of
8 March 11th at 8:30 a.m. and then we'll start trial right
9 after that.

10 How long do you think it will take to try this case?
11 Plaintiff?

12 MR. KING: Two days.

13 MR. GLAZER: Sounds reasonable, Your Honor.

14 MR. BAXTER: I think that sounds about right.

15 THE COURT: Okay. We'll set it for three days.
16 Things move around pretty quickly in here, especially with
17 all the electronics. We don't have a jury to deal with.
18 We'll go until we drop on each day and we'll see how much we
19 get done.

20 So a proposed deadline for amending pleadings, that
21 would be the first deadline, will be June 29th. Do you
22 anticipate any further amendments?

23 MR. BOLTON: I don't anticipate any. The only
24 amendment, and it's probably not even necessary, but would
25 be to identify some of the individual members, but that's

1 the only thing that I would contemplate.

2 THE COURT: Okay. Do the Federal Defendants
3 anticipate any amendments?

4 MR. GLAZER: We don't.

5 THE COURT: Intervenor?

6 MR. BAXTER: No.

7 THE COURT: Okay. Well, we'll set that deadline
8 June 29th.

9 Now, I hear talk of potential experts, perhaps
10 historical experts. Is the Plaintiff contemplating using
11 any experts in this case?

12 MR. BOLTON: At this point we do not anticipate
13 that.

14 THE COURT: Okay. Federal Defendants?

15 MR. GLAZER: We may indeed.

16 THE COURT: And Intervenor?

17 MR. HARBALL: No, sir.

18 THE COURT: All right. Well, we'll give you a
19 deadline for disclosure of experts as being October 1, 2012.

20 And then we've got the November discovery deadline and
21 then the December deadline for motions fully briefed. And
22 then I'll give you the other deadlines for filing things,
23 working back from the March 11th trial setting.

24 The one thing that--there are a couple of things that I
25 would like you to do. I'm sure you probably all do this

1 anyway. But if you would please--and we'll provide for this
2 in the Scheduling Order.

3 During discovery if you could number your exhibits
4 seriatim as you are going through, so if we end up reading
5 depositions or you end up submitting depositions to the
6 Court in lieu of live testimony, that the exhibit numbers
7 are consistent from discovery through trial.

8 Now, I don't know, is that Administrative Record, has
9 that been numbered?

10 MR. CAMPBELL: It's numbered.

11 MR. GLAZER: Yes.

12 THE COURT: So if we could just maintain those
13 numbers as well as you go through discovery. Did you number
14 those one through whatever?

15 MR. GLAZER: I have the exhibit.

16 THE COURT: Are all 70,000--

17 MR. CAMPBELL: No, Your Honor. Each 70,000
18 electronic comment is not numbered individually.

19 MR. GLAZER: Each document has a number that
20 consists of an alphabetic and numeric prefix.

21 THE COURT: So maintain, if you would, please, those
22 numbers through the process. So if you refer to those
23 documents during a deposition, just call them by whatever
24 the numbering is in the Administrative Record and then do
25 your additional numbering beyond that and then just go

1 seriatim all the way through so we have consistency with
2 exhibit numbering.

3 All right, here's the other thing that may be unique to
4 this court, although I would hope not, and I view it as
5 being again a humane thing to do.

6 We've got a provision here within our Scheduling Order
7 regarding foundation and authenticity of discovery items.
8 And what it provides is that, in terms of producing
9 documents, if the federal government produces a document and
10 if the Plaintiff or the Intervenor objects to the foundation
11 or authenticity of that document, you need to let counsel
12 for the government know, before the close of discovery, that
13 you've got an issue with authenticity or foundation to give
14 the parties an opportunity to clean it up before we get into
15 trial.

16 Similarly, if you produce a document--for instance,
17 Mr. Harball, if you produce a document from the Knights of
18 Columbus, and you, the producing party, have an issue with
19 the authenticity or foundation of that document, you need to
20 identify that you have that issue at the time you produce
21 it, so that the parties receiving that document again have
22 an opportunity to, if they think it's a valuable document,
23 to establish foundation or authenticity. Again, that's
24 spelled out here.

25 You know, so much of what we do is--I mean, the parties

1 stipulate to foundation and authenticity, but I guess you
2 would be surprised how many times then when we get the list
3 of the exhibits and the objections at the pretrial
4 conference, people are objecting to foundation and
5 authenticity. And we simply go back and refer to this order
6 and indicate if you haven't objected and gone through this
7 drill, then that objection's been waived.

8 Let me just look here. We're getting close. Okay,
9 Tyler, did I miss anything?

10 (Discussion held off the record.)

11 THE COURT: Let's revisit the issue of briefing,
12 because Mr. Gilman identified something for me here that
13 we've encountered, which is, I think I heard somebody say
14 cross-motions for summary judgment, which can be a nightmare
15 in terms of the amount of briefs that get filed.

16 Let me propose an alternative, which is, the Plaintiffs
17 will file their opening brief on November 15th. The
18 Defendants and Intervenorors will file their combined opening
19 and response brief on November 30th. Then the Plaintiffs
20 will file their combined response and reply brief on
21 December 14th, with the Defendants and the Intervenorors
22 filing their reply briefs on December 28th.

23 Do you want me to repeat those dates? I realize this is
24 ugly when we get into the end of December, but I would--
25 rather than doing this fully briefed with cross-motions,

1 that then gets to be--pretty soon we've got six briefs filed
2 from--I mean, we've got briefs all over the place and it's
3 unnecessary.

4 Do you want to tweak that proposed schedule?

5 MR. GLAZER: I would, only because our opposition
6 brief would largely be drafted during Thanksgiving week
7 schedule, and our surreply would be during Christmas week.
8 So either move things up or back. I mean, if the Court
9 would indulge us in that.

10 THE COURT: Yeah, no, I understand. Well, we've got
11 our December--or we've got our March trial setting. Why
12 don't we--

13 MR. GLAZER: We could move discovery up.

14 THE COURT: Well, I don't want to jam you on
15 discovery, but if you are all agreeable to that, we can move
16 this whole thing up or we can move the briefing back into
17 January.

18 MR. KING: I think it would be easier to move the
19 briefing back into January.

20 THE COURT: Okay. Tyler, have you got some
21 alternative January dates there or should we just go ahead
22 and pick some?

23 Can we go ahead and do that? We'll just pick some--
24 scout's honor, we're going to move all this briefing into
25 January. We'll pick some dates. We won't make somebody

1 file one on January 1st, the opening--Plaintiff's opening
2 brief. And then we'll work from there and we'll get this
3 done so that you are not trying to do this over the
4 holidays.

5 All right. Anything else? Anything I can do to help
6 you all out that we haven't already discussed this morning?

7 MR. KING: Not from the Plaintiff's standpoint,
8 Judge.

9 MR. BOLTON: There is one nonsubstantive comment
10 that my assistant wanted me to pass on. She deals with a
11 lot of the electronic filing systems and she says that your
12 system is about the most user friendly that she's dealt
13 with.

14 THE COURT: Did you hear that, Beth? That's great.
15 Okay, we'll be in recess then. I want to thank everybody.
16 We'll get the order out to everybody.

17 (Court concluded at 11:33 a.m.)
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C E R T I F I C A T E

[illegible]

I, Julie M. Lake, RDR, CRR, CSR, Freelance Court Reporter for the State of Montana, residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings in the above-entitled cause;

I further certify that the foregoing pages of this transcript represent a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on
this the 6th day of July, 2012.

Julie M Lake
Julie M. Lake, RDR, CRR, CSR
Freelance Court Reporter
State of Montana, residing in
Missoula, Montana.